(16) (14) (16)

Nos. 87-1614, 87-1639 and 87-1668

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN W. MARTIN, *et al.*,

Petitioners,

—v.—

ROBERT K. WILKS, *et al.*,

Respondents,

RICHARD ARRINGTON, JR., *et al.*,

Petitioners,

—v.—

ROBERT K. WILKS, *et al.*,

Respondents,

THE PERSONNEL BOARD OF JEFFERSON COUNTY, *et al.*,

Petitioners,

—v.—

ROBERT K. WILKS, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, ALABAMA CIVIL LIBERTIES UNION, AND WOMEN'S EQUITY ACTION LEAGUE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does due process require that a non-party to a Title VII lawsuit resulting in a consent decree, who has notice and an opportunity to be heard on the decree before it is entered, also be allowed to attack the decree in an independent lawsuit upon the same grounds as were previously presented as objections to entry of the decree?

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INTEREST OF AMICI[1/]

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization with over 250,000 members dedicated to the principles of individual liberty embodied in the Constitution. The Alabama Civil Liberties Union is one of its statewide affiliates.

The ACLU is actively involved in civil rights litigation throughout the country, and is a party to numerous consent decrees under Title VII and other civil rights statutes. The ACLU, therefore, has a direct organizational interest in the question of whether, and under what circumstances, civil rights consent decrees may be subject to collateral attack.

1/ Pursuant to Rule 36.2 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

The Women's Equity Action League (WEAL) was founded in 1968 as a national, nonprofit membership organization sponsoring research, education, litigation, and advocacy in support of the economic advancement of women. Central to that advancement is the full and effective enforcement of anti-discrimination laws to ensure equal opportunity for all.

WEAL actively supports litigation on behalf of women and has a vested interest in the integrity of consent decrees which it has entered into on behalf of its members. See e.g., Weal v. Califano (D.D.C., Civ. Action No. 74-1720). In addition, WEAL has appeared before this Court as amicus curiae in support of other affirmative action decisions including United Steelworkers v. Weber, 443 U.S. 193 (1979),

and Johnson v. Transportation Agency, 107 S.Ct. 1442 (1987).

STATEMENT OF THE CASE

Amici adopt the Statement of the Case found in the brief of Petitioners John W. Martin, et al.

SUMMARY OF ARGUMENT

The issue before this Court is a narrow one: Whether the court of appeals erred in holding that individuals having notice of, and an opportunity to be heard with respect to, a proposed Title VII consent decree are constitutionally entitled to attack the consent decree in subsequent independent lawsuits.[2/] In this

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2/ In this Brief, an independent lawsuit which seeks to invalidate a consent decree previously entered in a Title VII case is described as a "collateral attack" upon the decree. See generally Striff v. Mason, 849 F.2d 240 (6th Cir. 1988); Marino v. Ortiz, 806 F.2d 1144 (2d Cir. 1986), aff'd by equally divided Court, 108 S.Ct. 586 (1988); Thaggard v. City of Jackson, 687 F.2d

(continued...)

case, Respondents had actual notice for years of the pendency of Title VII litigation that may affect their employment rights; they had an opportunity to intervene virtually from the inception of the underlying Title VII litigation and for years thereafter; they were invited to participate actively in a judicial hearing to evaluate the fairness of the proposed consent decrees terminating such litigation; they had the very arguments they now assert brought before the court during the fairness hearing;[3] and they have a con-

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[2] (...continued)
66 (5th Cir. 1982), cert. denied sub nom., Ashley v. City of Jackson, 464 U.S. 900 (1983); Dennison v. City of Los Angeles Dep't of Water and Power, 658 F.2d 694 (9th Cir. 1981).

[3] The Birmingham Firefighters Association ("BFA") and two of its members, represented by the same counsel who now represents Respondents, appeared as amici curiae at the fairness hearing to object to the proposed terms of the consent decree.

tinuing opportunity to intervene in the underlying Title VII litigation to assert claims that any employment actions taken thereunder actually violate the consent decree, or that changed circumstances require judicial reexamination of the fairness or lawfulness of the decree. Amici respectfully submits that whatever may be the minimum due process rights of nonparties to participate in, and challenge, consent decrees, they were satisfied by a comfortable margin in this case.

Permitting Respondents collaterally to attack the decree in a subsequent independent lawsuit, as the court of appeals has done here, jeopardizes important public policies that encourage parties voluntarily to agree to resolve Title VII class action litigation. Allowing such attacks would remove most of the incentives which parties

have in such cases to negotiate an end to their legal dispute, thus delaying implementation of a remedy, increasing litigation costs, prolonging uncertainty for employers and employees about their future, and frustrating important principles of finality and repose that underlie judicial orders and decrees.

ARGUMENT

I. VITAL PUBLIC POLICIES ENCOURAGING VOLUNTARY COMPLIANCE WITH TITLE VII AND GIVING FINALITY TO JUDGMENTS WOULD BE SERIOUSLY UNDERMINED BY PERMITTING COLLATERAL ATTACKS UPON TITLE VII CONSENT DECREES

Due process is a flexible standard that takes form and meaning only when discussed within the context of the particular rights at stake. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). When it is determined that due process is applicable, the question becomes how much process is due. See

Mathews v. Eldridge, 424 U.S. 319, 349 (1976). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961). Thus, in determining what process is due nonparties who wish to attack consent decrees previously entered in Title VII litigation, the role of the consent decree, the public purpose it serves, and the procedures afforded to interested nonparties both before and after its entry, are all critically important.

A. Consent Decrees Play A Vital, Salutary Role In Contemporary Civil Rights Litigation

This Court has "on numerous occasions recognized that Congress intended for voluntary compliance to be the preferred means of achieving the objectives of Title

VII." Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 106 S.Ct. 3063, 3072 (1986). See also Johnson v. Transportation Agency, 107 S.Ct. 1442, 1457 (1987); W.R. Grace & Co. v. Local Union 759, Rubber Workers, 461 U.S. 757, 770 (1983)("[v]oluntary compliance with Title VII . . . is an important public policy."); Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974). Consensual resolution of disputes involving Title VII is no doubt the most effective means of achieving the statute's goal of eradicating discrimination:

> A remedy designed to reform the workings of a large organization is most effective when the organization cooperates in carrying out the remedy, and the human beings who make up an institution are more apt to cooperate in carrying out a negotiated scheme than in complying with an order imposed from above by a court.

Schwarzschild, Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform, 1984 Duke L.J. 887, 899 ("Schwarzschild").

Where a Title VII dispute has required resort to the courts before agreement among the parties can be achieved, consent decrees have been the preferred vehicle for ensuring the efficacy of the settlement. First appearing in the context of antitrust suits, see, e.g., Swift & Co. v. United States, 276 U.S. 311, 319-20 (1928), consent decrees are now almost routine in many civil rights litigation contexts, including hospital and prison litigation, school and housing desegregation suits, and equal employment claims. See Schwarzschild, supra.

Special characteristics inherent in civil rights litigation make consensual resolution particularly beneficial. See Anderson, Approval and Interpretation of Consent Decrees in Civil Rights Class Action Litigation, 1983 U.Ill.L.Rev. 579. First, plaintiffs in such litigation often are held to be entitled to "a complex, on-going regime of performance rather than a simple, one-shot, one-way transfer." Chayes, The Role of the Judge in Public Law Litigation, 89 Harv.L.Rev. 1281, 1298 (1976). Such relief is more likely to encounter bureaucratic resistance and delay within a defendant organization when ordered by a judge after a lengthy, contentious trial on the merits than if it were agreed upon through negotiation.4/ Consen-

4/ See, e.g., New York Times, August 2, 1988, at A1, col. 4 ("Yonkers Council, in Four to Three (continued...)

sual settlement thus acts as a lubricant for often-time reluctant compliance with Title VII's mandate.

Second, settlement significantly reduces litigation costs, both monetary and intangible. Particularly in the context of public agency defendants, the latter may be at least as significant as the former,5/ since a settlement usually avoids potentially embarrassing adverse findings against public bodies and officials that tend to hinder cooperation on long term solutions. In these cases it is often in the interest of all parties to reduce

4/ (...continued)
Vote, Defies Judge on Integration Plan").

5/ Title VII class action litigation often requires large expenditures of public funds. If plaintiffs prevail, they are ordinarily entitled to recover reasonable attorneys' fees from defendants, and such fees inevitably are far greater if plaintiffs prevail after a lengthy trial than if the case settles through negotiation.

tensions by seeking agreement upon a remedy, rather than engaging in all-out litigation.

Civil rights cases also may present complex and controversial difficulties that are less susceptible than private disputes to expeditious judicial resolution. While a lawsuit may have to be filed in order to achieve compliance with Title VII, a full trial on the merits often can be avoided. Leaders of defendant institutions and plaintiff groups often become better aware of the strengths and weaknesses of their legal position after a lawsuit commences, and are then willing to negotiate a resolution of the claims without substantial judicial involvement. Parties who present the court with agreed-upon solutions to their problems perform a valuable service to courts faced with an avalanche of liti-

gation. The judiciary therefore has special reason to protect and encourage the settlement process in such cases. See Armstrong v. Board of School Directors, 616 F.2d 305, 324-25 (7th Cir. 1980)("Thus, when a school desegregation suit is settled prior to its remedial portion, a potentially complex and time-consuming segment of the litigation may be avoided").

In addition, voluntary settlement mitigates an often-stated theoretical objection to judicially crafted institutional reform: the danger of unwisely or unnecessarily upsetting an elaborate, organic network of institutional and social relationships. The parties, working together, may craft a settlement that can more easily take account of their particular needs. While the parties know their institutions and the people who comprise

them, and usually have intimate familiarity with the underlying problems, few judges have similarly detailed knowledge -- or the time to acquire it -- which may be required to draft as appropriate and effective a decree as can the parties themselves. Thus, the process of negotiation and consent may often achieve a more finely tuned remedy than a fully adversarial resolution.

In addition to these important concerns relating particularly to Title VII litigation seeking institutional reform, the court of appeals' decision in this case also frustrates the more generic interests in finality of judgment and repose for litigants. This Court frequently has observed that according finality to judgments serves important objectives of preserving judicial resources, preventing costly and vexatious multiple lawsuits, and

minimizing the risk of inconsistent decisions. See University of Tennessee v. Elliot, 106 S.Ct. 3220, 3226 (1986); Kremer v. Chemical Construction Corp., 456 U.S. 461, 466 n.6 (1982); Montana v. United States, 440 U.S. 147, 153-54 (1979). See also United States v. Yonkers Bd. of Educ., 801 F.2d 593, 596 (2d Cir. 1986).

By protecting the finality of a consent decree, the court speeds the process of adjudication toward implementation of a constructive remedy for unlawful employment practices. Where there is no incentive to settle, the parties' energies are consumed by building up their own cases and tearing down their opponents'. On the other hand, if a consent decree is entered with some assurances to the parties of finality and repose, the focus can shift to actual implementation of the agreed-upon remedies

and compensation for the victims of discrimination.

Litigants clearly rely on these advantages when they enter such consensual arrangements:

> A consent decree has several other advantages as a means of settling litigation . . . . And it is likely to be easier to channel litigation concerning the validity and implications of a consent decree into a single forum -- the court that entered the decree -- thus avoiding the waste of resources and the risk of inconsistent or conflicting obligations.

Brief for National League of Cities, et al., as Amicus Curiae, quoted in Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 106 S.Ct. at 3076 n.13.

Thus, the consent decree has played a major role in modern civil rights litigation. In the employment discrimination context, it has substantially promoted achievement of those goals intended by

Congress to be met through settlement of Title VII claims by the parties themselves: remedies that appropriately take into consideration the intricate and complex factual circumstances that typically surround such litigation; speedier and less costly resolution of claims; and conservation of scarce judicial resources.

B. Permitting Collateral Attacks Upon Title VII Consent Decrees Would Greatly Reduce Their Efficacy And Create Interminable Uncertainties For Employers and Employees

The vital public interests in remedying discrimination and in finality of judgments are substantially undermined by the decision of the Eleventh Circuit, which allows collateral attacks on consent decrees by individuals who had actual notice and an opportunity to be heard with respect to the decree before it was entered. Permitting collateral attacks on

consent decrees under these circumstances unnecessarily burdens the courts and the parties with the likelihood of unending litigation that may prevent entirely any consensual remediation of important employment discrimination claims.

After all, it is the finality of the consent decree which, by allowing the parties to rely on the terms of the decree, makes settlement of complex civil rights litigation a rational option for the parties. If a consent decree were subject to repeated attack by individuals who were not parties to the initial litigation, no reasonable party would enter into such a nonbinding settlement, and no court would wish to waste its time reviewing and approving a decree which would likely serve only as a prelude to a series of additional lawsuits.

As this case demonstrates, the invitation to file collateral actions may result in endless litigation: more than 40 separate claims have already been raised challenging the consent decree involved here.[6/] Indeed, given the characteristics of class action Title VII litigation, it is virtually certain that at least one person may wish to object to any specific remedy that is devised. One objector who succeeds in altering the original terms of a consent decree would be a model for other objectors wishing to challenge the terms of subsequent relief. Cf. Yonkers Bd. of Educ., 801 F.2d at 596. Thus, the original parties would be subject to virtually unending litigation, with a consequent waste of judicial resources. See Thaggard

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6/ E.g., J.A. 172-74, 185-87, 293-94, 307-08, 314-15, 331-32.

v. City of Jackson, 687 F.2d 66 (5th Cir. 1982), cert. denied sub nom., Ashley v. City of Jackson, 464 U.S. 900 (1983); Hefner v. New Orleans Pub. Serv., Inc., 605 F.2d 893, 898 (5th Cir. 1979), appeal dismissed and cert. denied, 445 U.S. 955 (1980); Prate v. Freedman, 430 F.Supp. 1373, 1375 (W.D.N.Y.), aff'd mem., 573 F.2d 1294 (2d Cir. 1977), cert. denied, 436 U.S. 922 (1978).

Moreover, collateral attacks on consent decrees that have been carefully reviewed and approved by a court of competent jurisdiction necessarily call upon the second court to reconsider a decision in an earlier case, perhaps by a different judge or a different court.7/ "The proper exer-

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7/ Because of the potential for uncertainty, unending litigation, and the possibility of inconsistent obligations, employers would have little incentive to compromise their claims and (continued...)

cise of restraint in the name of comity keeps to a minimum the conflicts between courts administering the same law, conserves judicial time and expense, and has a salutary effect upon the prompt and efficient administration of justice." Bergh v. State of Washington, 535 F.2d 505, 507 (9th Cir.), cert. denied, 429 U.S. 921 (1976), quoting Brittingham v. Commissioner, 451 F.2d 315, 318 (5th Cir. 1971)(comment by Justice (then Judge) Kennedy in barring a collateral attack of a litigated judgment).

7/ (...continued)
enter into voluntary settlements.

> The Department would in effect be forced to walk a tightrope. If it refused to enter into the consent decree, it would be potentially liable to the [minority employees]. If it did enter into the agreement, it would be subject to suits for compensation by non-minority employees. Cf. United Steelworkers v Weber, 443 U.S. 193, 209, 99 S.Ct. 2721, 2730, 61 L. Ed. 2d 480 (1979)(Blackmun J. concurring).

Dennison, 658 F.2d at 696.

"To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." Montana v. United States, 440 U.S. at 153-54. Those same considerations of comity apply to a rule prohibiting collateral attacks of Title VII consent decrees by persons who had notice and opportunity to be heard prior to entry of the decree. All of these interests are jeopardized by the Eleventh Circuit rule freely permitting collateral attacks, even by those who had actual notice and an opportunity to be heard.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT DUE PROCESS REQUIRES THAT A NONPARTY TO A TITLE VII CONSENT DECREE WHO HAS NOTICE AND AN OPPORTUNITY TO BE HEARD ON THE DECREE BEFORE IT IS ENTERED MUST ALSO BE ALLOWED TO ATTACK THE DECREE IN AN INDEPENDENT LAWSUIT

A. Due Process Does Not Invariably Limit The Binding Effect Of A Judgment To Parties To The Suit

Without appropriately discussing the context of its ruling, the Eleventh Circuit held that Respondents could not be prevented from attacking the consent decree because they were not formal parties to the litigation underlying it, even though there had been no question that Respondents received notice and an opportunity to be heard before the decree was entered. In re Birmingham Reverse Discrimination Employment Litigation, 833 F.2d 1492, 1498 (11th Cir. 1987). See Pet.App. 3a-24a.[8/] The

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8/ The Eleventh Circuit explicitly noted "the due process underpinnings of preclusion law" in the (continued...)

court based this conclusion on "the same principles of res judicata and collateral estoppel that govern ordinary judgments . . . ." Id. However, the preclusion of a nonparty from litigating issues resolved in prior litigation, where the nonparty had notice and an opportunity to be heard therein, is not inconsistent per se with the requirements of due process. In this case the due process requirements prerequisite to foreclosing a collateral attack by Respondents upon the consent decree were satisfied by a comfortable margin: Respondents do not even allege inadequate notice; they had literally years to intervene between their having notice of the

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8/ (...continued)
decision appealed from in this action. See In re Birmingham Reverse Discrimination Employment Litigation, 833 F.2d at 1498. See Pet.App. 3a-24a.

lawsuit and entry of the consent decree;9/ as "persons who have an interest which may be affected by the Consent Decrees," Pet.App. 22a-23a, they were invited to participate and present objections at the fairness hearing that preceded judicial approval of the decree; and objections to the decree were in fact heard by the district court in language almost indistinguishable from that contained in Respondents' subsequent complaints.

9/ As the court of appeals observed:

> [They] knew at an early stage in the proceedings that their rights could be adversely affected, as was evidenced by their conversations with the City regarding the tactics the City should take in defending the action . . . . [They] chose to wait until after two trials and a long complex negotiation process had taken place [before seeking intervention].

U.S. v. Jefferson County, 720 F.2d 1511, 1516-17 (11th Cir. 1983). J.A. 149.

The fundamental right guaranteed by due process is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane, 339 U.S. at 314. The due process clause has never been held by this Court to require that a nonparty must always be allowed to contest the results of prior litigation through collateral attack. Indeed, the principle underlying this Court's decision in Penn-Central Merger and N & W Inclusion Cases, 389 U.S. 486 (1968), is that nonparties may, in appropriate circumstances, be collaterally estopped from relitigating judgments when they knowingly avoid participation in the original action.

In Penn-Central Merger, numerous plaintiffs filed challenges in several district courts to the Interstate Commerce Commission's approval of the merger of the Pennsylvania and New York Central railroads. The City of Scranton and a stockholder in the Pennsylvania Railroad filed complaints in the Southern District of New York. When the district court ordered them to file supplemental complaints, Scranton and the stockholder declined to comply, choosing instead to challenge the merger in the Middle District of Pennsylvania, where they had intervened in an action filed by the Borough of Moosic. The Pennsylvania court stayed the Moosic action pending a determination of the merits in the New York case. The New York court dismissed all complaints challenging the merger and upheld the I.C.C.'s decisions, whereupon

Scranton, the stockholder, and Moosic sought to go forward with their complaints in the Middle District of Pennsylvania. This Court held that the New York decision was binding both on Scranton and the stockholder, who were parties to the New York proceedings, and on Moosic, which, although neither a party nor an intervenor, "had an adequate opportunity to join in the litigation in that court following the stay of proceedings in the Middle District of Pennsylvania." 389 U.S. at 505.[10/] This Court observed:

> [A]ll district courts in which actions to review the Commission's findings or for injunctive relief were filed continued their proceedings in deference to the New York court. All parties with standing to challenge the Commission's action might have joined in the New York proceedings. In these circumstances, it necessarily follows that the decision of the New York court which, with certain exceptions, we have affirmed, precludes further judicial review or adjudication of the issues upon which it passes.

389 U.S. at 505-06 (footnote omitted).[11/] Cf. McKinney v. Alabama, 424 U.S. 669 (1976)(defendant in criminal obscenity proceeding may not be bound by a civil obscenity judgment when he did not have

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10/ In effect, the stay of the Pennsylvania action put Moosic on notice that its rights were likely to be determined by the outcome in New York. Likewise, Respondents in this case were fully aware that their interests would inevitably be affected by the final terms of the consent decree.

11/ In determining that the Borough of Moosic in Penn-Central Merger was precluded from relitigating the issues determined in the New York action, the court implicitly found that the notice and opportunity to be heard afforded Moosic in the prior litigation satisfied the due process clause, even though Moosic had not been a party. Thus, the broad statement in Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.7 (1979), that "[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore had never had an opportunity to be heard" is qualified by decisions such as Penn-Central Merger.

notice or an opportunity to participate in the earlier proceeding); Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 114 (1968).

In addition, several courts of appeals have followed Penn-Central Merger in precluding nonparties from relitigating issues presented in a prior action in appropriate circumstances, such as: (1) when the nonparty declined to participate in the prior action despite a judicial invitation to do so; or (2) when the nonparty failed to appeal from the denial of a motion to intervene in the original action.

For example, in Safir v. Dole, 718 F.2d 475, 483 (D.C. Cir. 1983), cert. denied, 467 U.S. 1206 (1984), the Court of Appeals for the District of Columbia Circuit cited both Patterson and Penn-Central Merger in holding that a group of shipping

lines was estopped from collaterally challenging a decision by the Secretary of Commerce requiring the lines to repay approximately $1 million in subsidies. Although the shippers' claims in Safir were inconsistent with the holding of the Second Circuit in a related case, the shippers argued that they could not be collaterally estopped because they did not participate in the Second Circuit proceedings. The court, in an opinion written by Justice (then Judge) Scalia, first observed that the shippers had "sedulously abstain[ed]" from intervening despite an invitation by the Second Circuit to do so. 718 F.2d at 483, quoting Safir v. Gibson, 432 F.2d 137, 145 (2d Cir. 1970)(on petition for rehearing), cert. denied sub nom., American Export Isbrandtsen Lines, Inc. v. Safir, 400 U.S. 942 (1970). The court then held

that because it "appear[ed] that the trade lines had full opportunity to argue the issue under discussion," it was "enough in law and reason to work a collateral estoppel." 718 F.2d at 483.12/

Similarly, in a case more closely analogous to the instant action, the Third Circuit held in National Wildlife Fed'n v.

12/ In addition, the D.C. Circuit followed the Penn-Central Merger reasoning and bound a nonparty by the terms of a prior determination in Rosen v. National Labor Relations Board, 735 F.2d 564 (D.C. Cir. 1984). The court also explicitly found that result to comport with the requirements of due process. In Rosen, an administrative law judge adjudicating a certification and unfair labor practice charge hearing included among his findings of fact a statement that one of the employer's attorneys handling the case had suborned perjury. The attorney subsequently brought a civil action alleging that the finding violated his due process rights because he had had no opportunity to present evidence at the hearing on the issue. The court concluded that even if due process required that the attorney have an effective right to contest the findings of the administrative law judge, he had that right in the form of a right of intervention in the Board proceedings. Having failed to exercise it, he had no right to a collateral hearing. 735 F.2d at 573.

Gorsuch, 744 F.2d 963 (3d Cir. 1984), that plaintiffs who had not timely intervened in an earlier lawsuit could not attack the terms of consent decrees to which they were not parties. The Gorsuch plaintiffs sought injunctive relief requiring six New Jersey sewage authorities to discontinue dumping sewage sludge into the Atlantic Ocean. A year before the Gorsuch plaintiffs filed suit, litigation concerning sludge dumping had commenced in the Southern District of New York and in the District of New Jersey. The district court in New York directed the EPA to revise its dumping regulations, but allowed New York City to continue ocean dumping. The New Jersey actions resulted in consent decrees that mirrored the order entered in the New York case. The Third Circuit in Gorsuch affirmed the denial of the plaintiffs' attempt to modify the

decrees, noting that the plaintiffs were aware of the earlier suits and knew that their interests were involved, yet deliberately chose not to intervene in the New York suit or to appeal the denial of their motion to intervene in the New Jersey action. The court of appeals concluded:

> Although the plaintiffs may not have had their day in court as litigants, they had the opportunity and for reasons of their own adopted a different approach. Plaintiffs cannot, at this stage, assert persuasively that the interest of finality should not prevail.

744 F.2d at 971-72. See also Western Shoshone Legal Defense & Education Ass'n v. United States, 531 F.2d 495, 502 (Ct.Cl.), cert. denied, 429 U.S. 885 (1976)("[T]he law is developing a critical eye toward persons who, knowing that a pending action is designed to stabilize legal relationships that concern them, deliberately stay out of that litigation although they could

easily enter it."); Cummins Diesel Michigan, Inc. v. The Falcon, 305 F.2d 721, 723 (7th Cir. 1962)(rejecting argument that ownership of a vessel could not be determined without joining a particular nonparty on the grounds that the nonparty had an opportunity to intervene but refused, and therefore is bound by the decree).

The result in Penn-Central Merger is entirely consistent with this Court's traditional due process analysis. The due process clause does not require party status as a prerequisite to finality in all circumstances, but rather an analysis of the appropriateness of binding persons by a prior judgment in the particular circumstances presented. As this Court observed in Mullane, to determine what process is due a court must look both to the govern-

mental interest in finality and the individual interest protected by the due process clause. 339 U.S. at 313-14.

B. Due Process Does Not Require That Persons Having Notice And An Opportunity To Be Heard On A Proposed Title VII Consent Decree Also Must Be Allowed To File An Independent Lawsuit Attacking The Decree Once It Becomes Final

Because the due process clause does not invariably preclude nonparties from being bound by the results of prior litigation, the Court must review the particular facts before it to determine whether the process afforded Respondents was constitutionally sufficient to preclude them from collaterally attacking the consent decree. The due process adequacy of a certain procedure is always tied to the particular situation facing the court: "[T]he interpretation and application of the Due Process Clause are intensely practical

matters . . . ." Goss v. Lopez, 419 U.S. 565, 578 (1975). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Cafeteria Workers, 367 U.S. at 895.

The Eleventh Circuit's analysis in the instant case failed to adopt this flexible, pragmatic approach. Instead it held flatly that due process requires that nonparties not be bound by the results of prior litigation. The court failed to examine the notice and prior opportunity to be heard afforded plaintiffs, or the countervailing interest of the government in finality to promote both the goals of Title VII and judicial efficiency. Thus, the Eleventh Circuit conducted no due process analysis as required by such cases as Mullane and Mathews v. Eldridge, 424 U.S. at 334:

> "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected."

There is no dispute in this case that Respondents here had adequate actual notice of the litigation years before entry of the consent decree. Indeed, Respondents' current counsel actively participated in the fairness hearing, raised at the time the same issues that are raised by Respondents here, and was given an opportunity to introduce evidence. When the governmental interests in finality and promoting the policies safeguarded by Title VII are measured against Respondents' interests, it is evident that Respondents have been afforded adequate due process and

should not, at this late date, be guaranteed a further right to challenge the lawfulness of the consent decree in an independent action.

As argued above, the government has a strong interest in according finality to a Title VII consent decree. Title VII reflects the strong federal policy against employment discrimination on the basis of race, sex, national origin or religion. Furthermore, the consent decree represents a peculiarly useful tool for the resolution of Title VII cases. It offers both the "preferred means for achieving" equal employment opportunity by voluntary compliance, Gardner-Denver Co., 415 U.S. at 44, and judicial supervision of the settlement, including a judicial determination, after a hearing, of the decree's fairness. The availability of this remedy for unlaw-

ful discrimination will be greatly reduced if it is not afforded finality as to all persons with notice and an opportunity to be heard in the original proceeding.

Strong arguments of judicial economy also support the governmental interest in finality. If the entry of a consent decree does not bar collateral attacks of the type presented here, then courts will be subject to ongoing litigation of the same issues, and face the specter of inconsistent results undermining principles of comity and potentially placing employers in the position of attempting to comply with conflicting judicial directives. Thus, not only does the position advocated by Respondents eviscerate an important Title VII remedy, but it renders the enforcement of a consent decree a morass for both the

federal courts and the parties to the decree.

If the process Respondents received here does not afford finality, parties wishing to protect their consent decree against collateral attack will feel compelled to join in a single lawsuit individuals and groups who are even potentially interested in the outcome. The costs of that approach are obvious. Mandatory joinder forces nonparties to become parties and to bear the expense of litigation (which in the Title VII context can include payment of the adversary's attorneys' fees). It also casts too broad a net, forcing all whom the parties think may come within the language of Rule 19 of the Federal Rules of Civil Procedure to become parties, thereby risking unmanageably large litigation. This danger is especially

acute in the context of Title VII class action litigation. On the other hand, where notice and an opportunity to be heard are afforded to all affected individuals, only those individuals who choose to bear the financial burdens and risks of litigation, and who actually wish to be heard, will become active participants.13/

The individual interest alleged by Respondents in this case must be measured against the strong governmental interest in finality and repose. Stripped to its essentials, what Respondents assert is the right to attack the lawfulness of the consent decree on their own timetable. The due process clause clearly does not guaran-

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13/ Correspondingly, both courts and parties will have an incentive to give adequate notice and an appropriate hearing to those whose collateral attacks they wish to preclude.

tee that right.14/ "What the Constitution does require," as this Court has repeatedly stressed, "is 'an opportunity [to be heard] . . . granted at a meaningful time and in a meaningful manner.'" Boddie v. Connecticut, 401 U.S. 371, 378 (1971) (emphasis added in Boddie), quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

Respondents in the instant case had the meaningful opportunity to be heard that due process requires. Specifically, Respondents had an opportunity to submit objections at the time the court was considering the fairness of the decree to all interested and affected parties. It was at that point, not later -- and not in some

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14/ If it did, statutes of limitation would be unconstitutional; plainly, they are not. See Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314 (1945); Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 349 (1944); Wheeler v. Jackson, 137 U.S. 245, 255 (1890).

collateral lawsuit -- that the court could best balance the rights and needs of all interested and affected parties, once and for all. Furthermore, individual disputes about the specific operation of the decree can always be presented to the original court through its continuing jurisdiction.[15/] Thus, Respondents had a meaningful opportunity to challenge the general lawfulness of the consent decree under Title VII in the original litigation. They also have the opportunity to challenge its particular application to themselves (although not its underlying lawfulness) by presenting a future application to intervene.[16/] As a result, "the risk of an

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15/ Indeed, the district court in this case has granted limited intervention for precisely those purposes on two occasions. J.A. 782-84.

16/ See n.15, supra.

erroneous deprivation of [Respondents'] interest through the procedures used [in this case]," Mathews v. Eldridge, 424 U.S. at 335, is relatively slight.

The Eleventh Circuit nevertheless reasoned that Respondents had no meaningful opportunity to be heard because "their Title VII claims did not accrue until after the decrees became effective and the challenged promotions were made; that is, their claims did not accrue until they were denied promotions." In re Birmingham Reverse Discrimination, 833 F.2d at 1498-99; Pet.App. 15a. This argument, although initially appealing, does not withstand analysis in the context of a Title VII consent decree.

In the usual case, a person could not, consistent with the due process clause, be said to have had an opportunity to be heard

on an unaccrued claim, because he or she would have had no notice of the claim and no standing to assert it. By contrast, Respondents here had notice that the race and sex-conscious relief of the proposed consent decree would affect their promotional opportunities as non-minority employees, and they were therefore afforded the opportunity to participate in the fairness hearing. Indeed, the objections to the remedies in the decree they now seek to relitigate were presented to and considered by the district court, and they would have been afforded party status had they sought to intervene in a timely fashion. Indeed, had Respondents timely intervened in the original action, they might have made the objections now presented as the basis for their collateral

suits the subject of an appeal from the judgment adopting the consent decree.17/

Thus, Respondents were like the competing railroad and other interests in Penn-Central Merger who were given an opportunity to assert their competing interest before the resolution of the

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17/ In the original action, the BFA and two of its members sought to intervene subsequent to the fairness hearing. No party filed a petition for certiorari to obtain this Court's review of the decision of the court of appeals affirming the denial of the petition to intervene as untimely. United States v. Jefferson County, 720 F.2d 1511, 1516-19 (11th Cir. 1983); J.A. 149. The propriety of that decision is, therefore, not before this Court. Nor is this Court presented with questions concerning the extent to which nonconsenting interveners may continue to pursue their objections to a consent decree in the original action. Cf. Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 106 S.Ct.at 3079-80. Rather, the Court is presented here only with the question whether a collateral suit attacking a consent decree may be maintained by persons making objections to the decree that are virtually indistinguishable from those actually heard and considered by the court prior to entry of the decree, and whose decision to seek intervenor status was unreasonably deferred to the point it was found untimely.

disputed action that would affect their rights was judicially approved. Therefore, notwithstanding the fact that individual employee claims may not have technically accrued prior to the entry of the consent decree, Respondents knew how their interests were implicated and had a meaningful opportunity to be heard. Further, Respondents can contest the actual implementation of the terms of the decree through the district court's ongoing jurisdiction.

Under these circumstances, and given the strong countervailing interest in affording Title VII consent decrees finality, due process does not require that Respondents now be given a second opportunity to attack the lawfulness of the consent decree.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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